Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

ANTHONY PIPOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Second Circuit erred in declining to grant a certificate of appealability when Pipola made a substantial showing of the denial of a constitutional right, that being the right to have the jury determine whether the acts charged affected interstate commerce, after the trial court directed the jury that the element of interstate commerce, which is an element of 18 U.S.C. § 1951, was a matter of law to be decided by the court, in violation of U.S. Supreme Court and Second Circuit precedent. Pipola was denied his right to trial by jury, and to due process of law.

2. The Second Circuit erred in denying the certificate of appealability when Pipola made a substantial showing of the denial of a constitutional right, by maintaining that he is actually innocent of one of the two weapons considered by the jury but not charged in the indictment, which resulted in an enhanced sentence for two firearms under 18 U.S.C. § 924(c)(1)(C)(I). This claim impacts constitutional violations of the right to effective assistance of counsel, and the right to a trial by jury on the indictment brought by the grand jury, and not an amended indictment urging conviction on conduct not before the court, which resulted in 20 additional year (240 months) sentence imposed by the court.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The May 31, 2006 opinion of the United States Court of Appeals for the Second Circuit appears at Appendix A page and is unpublished). The district court opinion and order are located at Appendices B and C and are not published opinions.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on May 31, 2006.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

18 U.S.C. § 924(c)(1)(A)(C) Penalties

> (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to a crime of violence. . . . .for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses

a firearm, shall, in addition to the punishment provided for such crime of violence . . .

(I) be sentenced to a term of imprisonment of not less than 5 years;

(C) In the case of a second or subsequent conviction under this subsection, the person shall

(I) be sentenced to a term of imprisonment of not less than 25 years;

18 U.S.C. §1951(a) (Hobbs Act) Interference with Commerce by threats or Violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

28 U.S.C. §2253(c)(1)(2)(3) Appeal

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —

(B)the final order in a proceeding under section 2255 [applies to F.R.Cv.P Rule 60(b)].

(c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

This case involves the following constitutional provisions:

U.S. Constitution Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or pubic danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Procedural History

Anthony Pipola was indicted on April 15, 1993 in a five count indictment, charging him with Hobbs Act violations and aiding and abetting the use of a firearm in a crime of violence. The case went to trial before the Honorable Sterling Johnson, United States District Judge, and Mr. Pipola was convicted on all counts. On April 10, 1995 he was sentenced to 97 months on Counts One, Two and Four, to run concurrently to each other; 5 years on Count Three and 20 years on Count Five to run consecutively to each other and to Counts One, Two and Four, for a total sentence of 397 months. The court imposed a $100,000 fine.

Mr. Pipola, represented by attorney John Pollock at sentencing and on appeal, raised the following issues in the Second Circuit on direct appeal:

> I. The Appellant's convictions for aiding and abetting in the use or carrying of firearms (counts three and five) should be reversed.
>
> > A. The Appellant's mere knowledge of the use or carrying of firearms during the underlying robberies is insufficient to sustain his convictions of aiding and abetting in the use or carrying of firearms

pursuant to Title 18 United States Code 924 (c)(1) & 2 (a).

B. The Trial Court committed reversible error when it charged the jury that the Appellant's mere knowledge of the use or carrying of firearms is sufficient to convict him or aiding and abetting in the use or carrying of forearms pursuant to Title 18 United States Code 924 (c)(1) & 2 (a).

II. The appellant's convictions should be reversed because the district court erred when it admitted non-probative, prejudicial evidence of other crimes, wrongs and acts despite defense counsel's objections.

The direct appeal was denied in 1996, *United States v. P[illegible]ola*, 83 F. 3d 556 (2d Cir. 1996). The circuit court's basis for the denial was

> []Mr. Pipola's] heavy reliance on *Medina* was misplaced . . . here the pistols supplied by Small at the instigation of Pipola were used during the commission of the crimes. *Medina* only knew a co-conspirator would carry a gun; here there was proof Pipola acted to encourage the carrying of guns by his co-conspirators. In *Medina*, the use of guns was a foregone conclusion, whereas in the present case using guns was an idea originated by [Pipola]. The proof at trial demonstrated that Pipola discussed the robberies with the persons who carried them out, assigned particular roles to the various participants, and actively assisted

> (through Small) in the carrying and use of firearms.

Pipola, *supra*, at 565. The Second Circuit admitted that the jury instruction "setting forth the knowledge requirement did not state the elements of aiding and abetting completely, but the Court found that the instructions as a whole 'delivered a correct interpretation of the law.'" *Id.*, 563.

Mr. Pipola filed a timely *pro se* petition for writ of habeas corpus, 28 U.S.C. §2255, raising the following issues:

> I. In failing to raise on appeal the court's jury instruction on the first and third elements with respect to personal property and interstate commerce, appellate counsel's representation of Anthony Pipola was constitutionally ineffective and fatally prejudicial, denying Mr. Pipola his Sixth Amendment right to counsel.
>
> II. The evidence was insufficient to support a conviction under the Hobbs Act because there was no proof whatsoever of an interstate commerce nexus with regard to the robberies for which the movant was indicted.
>
> III. The absence of a proper *Pinkerton* charge and proof that Anthony Pipola performed some act that directly facilitated or encouraged the use or carrying of a firearm rendered the jury instruction on violations of 18 U.S.C. §924 (c)(1) and on aiding and abetting infirm.

On October 19, 1999, Judge Johnson denied Mr. Pipola's habeas petition, and in doing so found that *United States v.*

Gaudin, 515 U.S. 506 (1995), a case decided during the pendency of direct review of Mr. Pipola's case, could not be applied retroactively, and failed to apply it to Mr. Pipola's case. Mr. Pipola then filed a motion for reconsideration on the following grounds:

> 1. The Court erroneously treated one of petitioner's ineffective assistance of counsel claims, the failure of appellate counsel to raise *Bailey v. United States*, 516 U.S. 137 (1995) on direct appeal as a challenge to the sufficiency of the evidence.
>
> 2. The Court wrongly held that petitioner had not met the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).
>
> 3. The Court ignored petitioner's claim that the Court provided irrelevant and prejudicial testimony in response to jury requests for two read backs.
>
> 4. The Court improperly affirmed petitioner's gun convictions on aiding and abetting theories of liability misapplying *Bailey* and finding that a *Pinkerton* charge was unnecessary.
>
> 5. The Court erred in finding that *United States v. Gaudin*, 515 U.S. 506 (1995) did not apply to petitioner's case.
>
> 6. The Court improperly concluded that sufficient evidence was presented to prove that the case was one that involved interstate commerce.

7. As stated in petitioner's July 19, 2000 letter to the Court, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is applicable to petitioner's case because "elements involved in the imposition of section 924 were removed from the jury's determination."

A hearing was held before Judge Johnson on January 11, 2001. Mr. Pipola was represented by counsel, Robert S. Mazzuchin, and Mr. Pipola was personally permitted to present arguments to the Court. At oral argument the government was unable to identify to the Court the type of gun used in Count Three, arguing that it was of no consequence what type of gun was used, because the government was not required to specify the gun used to convict Mr. Pipola under the statute. The Motion for Reconsideration was denied by Judge Johnson on April 27, 2001. The district court found that Mr. Pipola failed to present any new authority which would result in a different outcome. A Certificate of Appealability was denied by the district court, the U.S. Court of Appeals and the United States Supreme Court. *Certiorari* was denied on October 7, 2002. On February 26, 2004 Pipola filed a second motion for reconsideration, pursuant to F.R. Cv.P. Rule 60(b), which was denied June 17, 2005. (Appendix A). The following grounds were raised:

I. Legal Errors Which Prejudiced Mr. Pipola

(a) *Gaudin* was decided while Mr. Pipola's case was on direct review and should've been applied to this case;

(b) Judge Johnson erred by failing to apply *Gaudin*, finding a *Teague* retroactivity analysis must take place;

(c) Appellate counsel, John Pollack, failed to raise the interstate commerce issue on direct appeal, or the concomitant error under *Stirone*, which, in effect, amended the indictment by inserting the interstate commerce element not charged by the grand jury in the indictment; further, Mr. Pollock failed to raise on appeal the error preserved at sentencing, that the August conversation with Small concerning the use of a weapon at the first aborted robbery not charged in the indictment is insufficient to support a second 924(c) conviction for the use of a firearm second completed robbery in late September.

(d) Judge Johnson erroneously instructed the jury that the element of interstate commerce had been satisfied.

II. Material Factual and Legal Errors Made in the Case Which Were Not Properly Decided In Any Post Trial Decision, and Which Resulted in Prejudice to Mr. Pipola.

III. It was error to sentence Mr. Pipola to a second or subsequent gun charge under 18 U.S.C. §924(c)(1)(c), to an additional 20 years in prison.

On September 8, 2005 a request for a certificate of appealability was filed, which was summarily denied on September 15, 2005 (Appendix B). The following issues were requested to be certified for appeal:

1. Jurists of reason would find it debatable that the district court abused its discretion in failing to consider the factual finding previously made by the court, concerning

the weapon from the incomplete robbery which was not a part of this indictment in the Rule 60(b) petition.

2. Jurists of reason would find the district court's decision debatable in the court's failing to find that (a) there was a valid constitutional claim previously raised as to the ineffectiveness of appellate counsel for failing to raise the interstate commerce issue, and (b) that the district court erred by finding that prominent appellate lawyer, John Pollock, would not have understood the import of *Gaudin* between June 19, 1995 (the date *Gaudin* was decided) and July 3, 1995 (the date the appellate brief was filed), and was, as a result, not ineffective; (c) most respectfully, jurists of reason would find it debatable and would find that the Court *did* remove the finding of interstate commerce from the purview of the jury, and that the opinion is in error finding that the Court actually instructed the jury to make an independent decision as to interstate commerce.

3. The district court erred in declining to find that error of constitutional magnitude existed in the application of *Gaudin* and *Vasquez*, in finding that the district court's charge, when read as a whole, conveyed to the jury that it was the jury who was to decide whether Pipola's actions had an impact on interstate commerce.

4. Jurists of reason would find it debatable whether the district court abused its discretion in failing to consider the factual basis of its affirmation of *Bailey* and *Pinkerton* arguments in the prior habeas and petition for reconsideration.

5. Jurists of reason would find an abuse of discretion by the district court, for concluding that the commerce/ constructive amendment to the indictment issue under *Stirone*, would have resulted in a baseless appellate argument. The district court did not address the argument that one act cannot result in two 924(c) sentences - one of them an enhanced sentence. Jurists of reason would find it debatable whether the enhancement is constitutional.

6. Jurists of reason would conclude that the district court erred in finding that appellate counsel was ineffective for failing to properly explain the gun issue at oral argument, an issue which this Court has misapprehended.

On October 6, 2005 Pipola filed for a certificate of appealability to the U. S. Court of Appeals for the Second Circuit. The Second Circuit denied to issue a certificate of appealability on May 31, 2006 (Appendix C). The same issues were asked to be certified for appeal in the plea to the Second Circuit. This petition follows. Mr. Pipola is serving his 397 month sentence at F.C.I. Schuylkill.

This Petition for Writ of Certiorari is timely filed.

REASONS FOR GRANTING THE PETITION

1. **The Second Circuit erred in declining to grant a certificate of appealability when Pipola made a substantial showing of the denial of a constitutional right, that being the right to have the jury determine whether the acts charged affected interstate commerce, after the trial court directed the jury that the element of interstate commerce, which is an element of 18 U.S.C. § 1951, was a matter of law to be decided by the court, in violation of U.S. Supreme Court and Second Circuit precedent. Pipola was denied his right to trial by jury, and to due process of law.**

The Court should grant the writ because Pipola continues to await a full and fair hearing on the merits of his claims. The decisions of the lower courts fail to comply with the holdings of the United States Supreme Court and of the Second Circuit Court of Appeals.

The district court determined that its instruction to the jury was not fatally flawed. Jurists of reason would disagree, and the district court, most respectfully, erred in denying Pipola relief. This district court very clearly told the jury that there was "*no issue as to . . . what is considered interstate commerce; . . . it is a question of law for me to decide whether an activity or a business is considered interstate commerce; I instruct you that the objects or activity referred to in the indictment are interstate commerce.*" (Emphasis supplied.) Tr. 1146-47. For the district court to now opine that it turned over the finding of interstate commerce to the jury, based upon the instruction to the jury to decide the "question of fact" of "whether such a delay, obstruction or effect has occurred" concerning an item moving in interstate

commerce, does not comport with the common sense meaning of the language of the instruction. The district court did not tell the jury to decide the element of interstate commerce as it claims at page 15 of the opinion (Appendix A). The district court told the jury to determine whether a delay or obstruction caused by the defendants took place - period. The language the district court claims re-gifted the Pipola jury with the decision of "whether the element of interstate commerce has been met", follows the ***clear*** instruction that the only person who decides whether the activity or business is considered interstate commerce is the trial judge: "it is a question of law for me to decide." (Tr. 1146-47) So it is with the sense that the matter of interstate commerce has already been decided by the district court that the next reference to interstate commerce must be viewed. "The third element–that interstate commerce, or an item moving in interstate commerce, was delayed, obstructed or affected in some way as a result of the defendant's action– it is a question of fact for you, the jury to determine. " (Tr. 1147-1150) The question of fact the district court asked the jury to decide is *whether Pipola and his co-defendants obstructed or affected something* moving in interstate commerce - and whether what the defendants affected or obstructed moved in interstate commerce had already been decided by the district court. This statement does not return to the jury the precious decision of whether or not the activity or business is in interstate commerce. Jurists of reason would determine that the element of interstate commerce was not one for the jury to decide because it had been decided for them by Judge Johnson.

The district court erred in declining to find that error of constitutional magnitude existed in the application of *United States v. Gaudin*, 515 U.S. 506 (1995) and *United States v.*

Vasquez, 267 F.3d 79 (2d Cir. 2001), in finding that the district court's charge, when read as a whole, conveyed to the jury that it was the jury who was to decide whether Pipola's actions had an impact on interstate commerce. The district court removed this finding from the ambit of the jury and, in failing to acknowledge its error, abused its discretion. Interstate commerce is a material element of the offense which the district court removed from the jury, directing the jury to find that the interstate commerce connection had been established. A trial judge is prohibited from entering a judgment of conviction or directing a jury to come forward with such a verdict regardless of how overwhelming the evidence may point in that direction. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). Review of Pipola's case has treated this combination of legal factors as a right flowing from the defendant when, in fact, proof of elements of an offense to the jury is a duty of the tribunal itself in order for it to claim jurisdiction. *In Re Winship*, 397 U.S. 358 (1970). The standard of proof is not the defendants' either to make or to acquiesce. It is the burden placed on the government, without which no conviction can be constitutionally or jurisdictionally obtained. This failure of a tribunal to function as a court of American justice is a structural defect of the highest order. The *Winship* doctrine, which "establish[ed] so fundamental a substantive constitutional standard, must also require that the fact finder will rationally apply that standard to the facts in evidence." *Jackson v. Virginia*, 443 U.S. 307, 317 (1979).

The analysis of the court does not comport with *Gaudin* and *Vasquez*. On the one hand, the district court, in the opinion at 7, Appendix A, states that the charge of the court comported with the law at the time, that the court could decide interstate commerce as a matter of law, yet at pages 13-14 of

the same order the district court states that the charge did comport with *Gaudin*, that the district court, in its instruction, gave the issue of interstate commerce to the jury to decide, citing *Vasquez*. Pipola's case does not at all lend itself to the reasoning the Second Circuit used in *Vasquez*: that there was also a third element - the enterprise - and the element of interstate commerce had to be found by the jury as to the enterprise, therefore the court's charge in *Vasquez* did not result in a *Gaudin* error. Pipola was not charged with racketeering; he was charged with a violation of the Hobbs Act. Jurists of reason would consider the finding of the court debatable, and as a result this is an issue which should have been certified to be heard by the appellate court. With all due respect to the district court, the reasoning of the district court is precarious, in arriving at the end result, and the case law cited in support is not applicable to this case. This is an important case which has resulted in confinement for what will be the rest of this petitioner's natural life, because he will not survive the sentence imposed by the court due to his age, unless he is granted the relief sought. As a result, it is respectfully submitted that this issue should have been certified for review as Pipola met all elements of *Kellog v. Strack*, 269 F. 3d 100 (2d Cir. 2001) .

2. The Second Circuit erred in denying the certificate of appealability when Pipola made a substantial showing of the denial of a constitutional right, by maintaining that he is actually innocent of one of the two weapons considered by the jury but not charged in the indictment, which resulted in an enhanced sentence for two firearms under 18 U.S.C. § 924(c)(1)(C)(I). This claim impacts constitutional violations of the right to effective assistance of counsel, and the right to a trial by jury on the indictment brought by the grand jury, and not an amended indictment urging conviction on conduct not before the court, which resulted in 20 additional year (240 months) sentence imposed by the court.

The Supreme Court is urged to grant the Petition for Writ of Certiorari to decide an issue of the utmost urgency and importance, which causes prolonged incarceration of individuals whose claims have not been addressed, and who claim actual innocence, as opposed to legal innocence, of the crime charged, yet are denied a certificate of appealability to pursue their constitutional claims. Pipola received a consecutive 25 year enhanced sentence based on a second firearm, when the first firearm said to be the basis for the first §924(c) conviction, was not charged in the indictment. No court has heard Pipola on this issue; he has been summarily denied without a hearing or a decision on the merits of his claim.

The individual interest in avoiding injustice is most compelling in the context of 'actual innocence.' Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the

"fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, *supra*, (Harlan, J., concurring). *See also* T. Starkie, Evidence 756 (1824) ("The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned"). See generally Newman, Beyond "Reasonable Doubt," 68 N. Y. U. L. Rev. 979, 980-981 (1993).

The overriding importance of this greater individual interest merits protection by imposing a somewhat less exacting standard of proof on a habeas petitioner alleging a fundamental miscarriage of justice than on one alleging that his sentence is too severe. As the Supreme Court has noted, ". . . a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. at 370; see also *Addington* v. *Texas*, 441 U.S. 418, 423, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979). The standard of proof thus reflects "the relative importance attached to the ultimate decision." *Ibid.*

It should be noted that although the standard for proving actual innocence in most cases requires that the defendant be actually innocent as opposed to legally innocent, the Supreme Court in *Sawyer v. Whitley*, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) made it clear that "actual" innocence did not mean innocence of the charged crime. In that case the Court applied actual innocence exception although the petitioner conceded guilt of the underlying crime. *Sawyer* explained that actual innocence in the sentencing context focuses on the elements that render a defendant eligible for a particular penalty. In this instance

the gun which was used to convict Pipola of the enhanced penalty section of 924(c) was not charged in the indictment, and it resulted in 20 additional years being added on to his sentence.

The factual basis underlying the 924(c) convictions is inaccurate, and for the Second Circuit to decline Pipola permission to litigate on appeal, district court's failure to correct the false factual basis, which resulted in two 924(c) convictions instead of one, is error. When the district court stated in its opinion, at page 19, that both the district court and the Second Circuit found that Pipola gave Small the task of supplying the gun for the robbery, it is true that both courts made that finding however, that finding of fact is factually inaccurate. Appellate counsel, John Pollack, failed to raise the interstate commerce issue on direct appeal, or the concomitant error under *United States v. Stirone*, 361 U.S. 212, 80 S. Ct. 270 (1960), which, in effect, amended the indictment by inserting the interstate commerce element not charged by the grand jury in the indictment; further, Mr. Pollock failed to raise on appeal the error preserved at sentencing, that the August conversation with Small concerning the use of a weapon at the first aborted robbery not charged in the indictment is insufficient to support a second 924© conviction for the use of a firearm in the first completed robbery in late September. The robbery in which Pipola supposedly gave Small the task of supplying the gun was the first robbery contemplated, it was an unconsummated robbery, and - most importantly - *that robbery was not charged in the indictment.* The following facts are the actual facts in the record, yet they are not the facts upon which this case was decided. All appellate and post conviction review of this case has proceeded on an erroneous factual basis.

a. Mr. Pipola did *not* supply the gun that was used in the robberies, a theory the government has promoted and which has been erroneously adopted by the courts. The robbers themselves supplied their own guns, just like Medina[1].

b. Mr. Pipola did not tell Small to get a gun to use in the robberies charged in the indictment, as the government claims was testified to by Small. That was not Small's testimony.

c. The *actual* first robbery attempt was City Bank, which never happened. The gun here was a broken .22 caliber gun. Small supplied Donahue with the broken .22. This is the gun which was said to have been supplied after a meeting at which Pipola instructed Small to supply the gun for the first robbery, which was aborted, and which was not charged in this indictment.

d. The second attempt, which was the first completed robbery, was Dubovsky & Son. The Court wrongfully assumed, when Small said he hadn't gotten back the .22, that the weapon used was the one originally supplied by Small, for this completed robbery. The Small .22 was not used in the completed robbery. Donahue had a .380, Donahue's personal gun. Loizzo testified that he got his gun from Martarella.

e. The third robbery attempt, which was the second completed robbery was at Caswell Farm, but the

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1. *United States v. Medina*, 32 F.3d 40 (2d Cir. 1994).

truck was parked at City Bank. It was not a bank robbery. The .380 was used by Donahue and the.25 caliber was supplied by Martarella and was used by Rogers.

f. The government has taken the position that Martarella supplied the guns on both occasions to Rogers and Loizzo, and that Donahue had his own gun on both occasions. So the Small the .22 is not involved in any of the robberies charged in the indictment - the Small .22 does not exist in the case as charged.

It has always been Pipola's position that, even if he had supplied the gun - as Medina did - and if the gun was not used then, like Medina, he is not criminally responsible. *See United States v. Medina*, 32 F. 3d 40 (2d Cir. 1994). As a result, Pipola is factually and legally innocent of the 924(c)(1)(C)(I) second conviction resulting in 20 additional years being added as a consecutive sentence.

Pipola was denied the protections of the Fifth and Sixth Amendments to the U.S. Constitution due to appellate counsel errors, errors by the trial court and errors by the appellate court; further Pipola was placed on trial and sentenced for charges not in the indictment, with no factual basis in the record, which resulted in him receiving 240 months additional time in prison.

The certificate of appealability should have been granted, as Pipola met the standard as set forth in *Kellog v. Strack*, 269 F.3d 100 (2d Cir. 2001) .

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 31, 2006

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 31st day of May, two thousand and six,

Present:

Hon. Wilfred Feinberg,
Hon. Sonia Sotomayor,
Hon. Peter W. Hall,
Circuit Judges.

05-4279-pr

Anthony Pipola,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability in his appeal from the district court's denial of his Federal Rule of Civil Procedure 60(b) motion. Upon due

consideration, it is ORDERED that the motion is denied and the appeal is DISMISSED. Appellant has not shown that "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the [motion for reconsideration], and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the [reconsideration] motion, states a valid claim of the denial of a constitutional right," *Kellogg v. Strack,* 269 F.3d 100, 104 (2d Cir. 2001).

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By: s/ Lucille Carr

APPENDIX B — MEMORANDUM UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK DATED AUGUST 24, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case Number: CV-97-4988
Pipola v. USA

Date: 8/24/05

To: Judge Johnson
United District Court Judge

From: Mary Ann McGee
Appeals Clerk

MEMORANDUM

Attached please find Motion/Request for:

* * *

X Certificate f Appealability X Denied

* * *

So Ordered
s/ [illegible]
United States District Court Judge

Dated: 9/15/05

APPENDIX C — MEMORANDUM AND ORDER UNITED STATES DISTRICT COURT, EASTERN DISTRICT NEW YORK DATED MAY 31, 2005 AND FILED JUNE 17, 2005

UNITED STATES DISTRICT COURT, EASTERN DISTRICT NEW YORK

No. 97 CV 4988(SJ)

ANTHONY PIPOLA,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER

JOHNSON, Senior District Judge:

Petitioner Anthony Pipola ("Petitioner") brings this motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b). For the reasons stated herein. Petitioner's motion is DENIED.

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BACKGROUND

Petitioner was convicted on May 4, 1995, following a jury trial, of robbery conspiracy to obstruct commerce in violation of the Hobbs Act, *18 U.S.C. § 1951(a)*; two counts of aiding and abetting obstruction of commerce by means of robbery in violation of *18 U.S.C. §§ 2(a), 1951(a)*; and two counts of aiding and abetting use or carrying of firearm during crime of violence in violation of *18 U.S.C. §§ 2(a), 924(c)(1). United States v. Pipola, 83 F.3d 556 (2d Cir.1996).*

The charges against Petitioner arose in connection with two armed robberies during which cash and checks were taken from employees of Anchor Armored Delivery, Inc. ("Anchor"). The robberies took place outside the Dubovsky & Sons warehouse ("Dubovsky") and at a Citibank branch, both located in Queens, New York. *Id.* In the Citibank robbery, Anchor was delivering money from Caldwell Farms ("Caldwell"), an Anchor customer, to the bank. (Resp.App. Br., *1995 WL 17202813, at *5.*)

Petitioner was sentenced to concurrent 97-month prison sentences for the robbery and conspiracy counts and consecutive terms of 60 months and 240 months for each of the firearms charges, for a total term of imprisonment of 397 months. *Id.* Petitioner appealed and his conviction and sentence were upheld by the Second Circuit on April 29, 1996. *Id.* The United States Supreme Court denied certiorari on October 7, 1996. *Pipola v. United States, 519 U.S. 869 (1996).*

On August 26, 1997 Petitioner filed a habeas petition pursuant to *28 U.S.C. § 2255*, seeking vacatur of his

conviction and sentence on all counts of the indictment. The Petition asserted the following grounds for relief: 1) in failing to raise on appeal the Court's jury instruction on the first and third elements with respect to personal property and interstate commerce, appellate counsel's representation was unconstitutionally ineffective; 2) the evidence was insufficient to support a conviction under the Hobbs Act because there was no proof of an interstate commerce nexus with regard to the robberies for which Petitioner was indicted; and 3) the absence of a proper *Pinkerton* charge and proof that Petitioner performed some act that directly facilitated or encouraged the use or carrying of a firearm rendered the jury instruction on violations of *18 U.S.C. § 924(c)(1)* and aiding and abetting infirm. (Pet.'s *Fed.R.Civ.P. 60(b)* Mot. at 4.) The habeas petition was denied by this Court on October 19, 1999. *Pipola v. United States, 1999 WL 993718 (E.D.N.Y. Oct. 19, 1999).*

On October 26, 1999, Petitioner filed a motion for reconsideration of the Court's dismissal of his habeas petition, which Petitioner styled as a motion pursuant to *Federal Rule of Civil Procedure 59(e)* and which the Court construed as a motion for reconsideration under Eastern District of New York *Local Civil Rule 6.3* ("first motion for reconsideration"). The first motion for reconsideration asserted the following claims: 1) the Court erroneously treated one of Petitioner's ineffective assistance of counsel claims-the failure of appellate counsel to raise *Bailey v. United States, 516 U.S. 137 (1995)* on direct appeal-as a challenge to the sufficiency of evidence; 2) the Court wrongly held that Petitioner had not met the standard for ineffective assistance of counsel set forth in *Strickland v. Washington, 466 U.S. 668 (1984)*; 3) the Court ignored

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Petitioner's claim that the Court provided irrelevant and prejudicial testimony in response to jury requests for two read backs; 4) the Court improperly affirmed Petitioner's gun convictions on aiding and abetting theories of liability by misapplying *Bailey* and finding that a *Pinkerton* charge was unnecessary; 5) the Court erred in finding that *United States v. Gaudin, 515 U.S. 506 (1995)*, did not apply to Petitioner's case; 6) the Court improperly concluded that sufficient evidence was presented to prove that the case was one that involved interstate commerce; and 7) *Apprendi v. New Jersey, 530 U.S. 466 (2000)*, is applicable to Petitioner's case because "elements involved in the imposition of *section 924* were removed from the jury's determination." (Pet.'s *Fed.R.Civ.P. 60(b)* Mot. at 4-5.) The Court denied the first motion for reconsideration in a Memorandum and Order dated April 27, 2001 ("the 2001 Order"). Petitioner appealed this decision to the Second Circuit, which denied his appeal on March 4, 2002.

On February 26, 2003, Petitioner filed another motion for reconsideration ("second motion for reconsideration"), which is presently before the Court, seeking to have the Court consider the merits of his case for the fourth time. The second motion for reconsideration is brought pursuant to *Federal Rule of Civil Procedure 60(b)*. The motion raises the following issues: 1) *Gaudin, 515 U.S. 506*, should have been applied to this case and would require a finding that the jury instructions utilized by the Court were unconstitutional because they removed the question of whether the commerce

at issue in the case was interstate as opposed to intrastate;[1] 2) the Court erred in the 2001 Order by failing to apply *Gaudin*, finding that a retroactivity analysis was required despite the fact that *Gaudin* was decided while Petitioner's case was on direct review; 3) appellate counsel was unconstitutionally ineffective for failing, on direct appeal, to raise the *Gaudin* issue; 4) appellate counsel was unconstitutionally ineffective for failing, on direct appeal, to raise a claim under *Stirone v. United States, 361 U.S. 212 (1960)*; 5) appellate counsel failed, on direct appeal, to argue that the testimony of Steven Small (and other evidence presented at trial) was both factually and legally insufficient to support a second 924(c) conviction; and 6) the Court erroneously instructed the jury that the element of interstate commerce was satisfied.

As a threshold matter, the Court must address Respondent's contention that Petitioner's motion for reconsideration should be construed as a successive collateral attack because Petitioner's arguments allegedly address the

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1. Petitioner has phrased the *Gaudin* argument in terms of whether the question of "the materiality of the interstate commerce connection" should have been submitted to the jury. However, the Court finds that the argument is more properly described in terms of the question of whether the element of interstate commerce (as opposed to the *materlality* of the interstate commerce) should have been submitted to the jury. It is not clear that "materiality of an interstate commerce connection" is a recognized legal concept, but the presence or absence of interstate commerce and the issue of whether there is a sufficient nexus with interstate commerce to establish federal jurisdiction are well-recognized, and so the Court infers that these are the issues Petitioner is referencing.

integrity of the criminal trial rather than the integrity of the federal habeas proceeding. (Mem. Law Opp'n Mot. Relief at 4-7.) However, the Court finds that with respect to the *Gaudin* issue, Petitioner is clearly addressing an error made by this Court during the course of his habeas proceeding, *Pipola, 1999 WL 993718, at *5*, and thus a motion for reconsideration of the previous Order is the appropriate vehicle for his arguments. Because the claim relating to the Court's allegedly erroneous instruction is linked to the *Gaudin* issue, the Court will address that claim as well. With respect to the issue of *Stirone*, because Petitioner raised *Stirone* in his original habeas petition and the Court made a finding regarding Petitioner's *Stirone* argument in its 2001 Order, *id.* at *5-6, the Court finds that the claim can be dealt with here rather than through a successive collateral attack, in the interests of efficiency and finality. However, with regards to ground five, regarding the second 924(c) conviction (the insufficiency of evidence and ineffective assistance counsel claims), the Court can find no antecedent to the claim in Petitioner's habeas petition and therefore cannot consider this claim in the context of a Rule 60(b) motion, as discussed below.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 60(b) provides that a court may relieve a party from final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in

> time to move for a new trial under *Rule 59(b)*; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

DISCUSSION

I. Grounds One, Two, Three, and Six

In Ground Six, Petitioner appears to argue that the Court's instruction on the interstate commerce element was erroneous even under the law that was applicable prior to *Gaudin*. Grounds One, Two, and Three address the contention that *Gaudin*, 515 U.S. 506, should have been applied to Petitioner's case, alleging that the Court should not have held that a retroactivity analysis was needed since *Gaudin* was decided while Petitioner's case was on direct review, that *Gaudin* should apply to Petitioner's case, and that appellate counsel should have asserted this argument on appeal. Petitioner's conviction did not become final until October 7, 1996, and *Gaudin* was decided on June 19, 1995. Petitioner is therefore correct that this Court erred in its previous Orders in finding that retroactivity analysis was required and in

failing to apply *Gaudin* to Petitioner's case. However, for the reasons stated below, the Court finds that the *Gaudin* claim nevertheless must be denied, because it is procedurally barred.

i. Ground Six

Petitioner contends that this Court erroneously instructed the jury that the element of interstate commerce had been satisfied. As mentioned above, the Court did state, in the course of the jury instructions, "I instruct you that the objects or activity referred to in the indictment are interstate commerce." (Tr. 1147.) This instruction was given pursuant to prevailing law at the time of the trial, prior to the *Gaudin* decision, which held that courts could decide whether commerce was interstate as a matter of law, rather than submitting the question to the jury. *United States v. Vasquez*, 267 F.3d 79, 89 (2d Cir.2001) (citing *United States v. Calder*, 641 F.2d 76, 78 (2d Cir.1981); *United States v. Augello*, 451 F.2d 1167, 1170 (2d Cir.1971)).

The Court's finding was based on testimony that either Caldwell or Dubovsky or both "did business in New Jersey [and] Connecticut, and these were the funds from that particular business, ergo, it could rationally be inferred that it was an [sic] interstate commerce." (Tr. 975; *see also* Tr. 800-813.) This finding was in accordance with well established law stating that "the burden of proving a nexus to interstate commerce is minimal," *United States v. Elias*, 285 F.3d 183, 188 (2d Cir.2002), and that "[t]he jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce." *Id.* (quoting

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United States v. Angelilli, 660 F.2d 23, 35 (2d Cir.1981)). "Even a potential or subtle effect on commerce will suffice." *Angelilli*, 660 F.2d at 35.[2]

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2. Purely intrastate transportation of goods or financial instruments that are ultimately bound for destinations outside the state or are part of a continuous flow of interstate commerce has been found by other courts to constitute interstate commerce. *E.g. Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 672 (10th Cir.1993) ("Transportation within a single state may remain 'interstate' in character when it forms a part of a 'practical continuity of movement' across state lines from the point of origin to the point of destination."); *Baez v. Wells Fargo Armored Service Corp.*, 938 F.2d 180, 182 (11th Cir.1991); *McGee v. Corporate Express Delivery Systems*, 2003 WL 22757757, *5 (N.D.Ill. Nov. 20, 2003) ("A driver does not have to cross state lines to engage in interstate commerce.").

The Court also finds that Petitioner's argument that the money was, in effect, the property of Anchor alone at the time that it was being transported, due to an alleged indemnification agreement with Dubovsky and Caldwell, cannot undermine the finding that the commerce was interstate. Petitioner has not cited any cases to indicate that parties can effectively defeat federal jurisdiction through private contractual arrangements in the form of indemnification agreements, nor has the Court been able to locate any such cases. That said, the Court cannot adopt Petitioner's argument that the indictment was rendered infirm due to the fact that the Anchor was named as the victim of the robbery, and therefore must have suffered a loss of its "personal property," yet the property was treated as belonging to Dubovsky and Caldwell for purposes of the interstate commerce nexus. Clearly, armored car companies or other entities that transport or protect others' financial assets are not left unprotected by laws against robbery simply because the property they are protecting is still technically the property of other individuals or entities. They can be the named victims of robberies.

In short, there was no error in the Court's instruction under the law that applied prior to the Supreme Court's subsequent decision in *Gaudin*. The fact that the instruction was later called into question by *Gaudin* is a separate issue, which is discussed below.

ii. Grounds One, Two, and Three

Gaudin was decided after the conclusion of Petitioner's trial but before Petitioner's direct appeal. The effect of *Gaudin* was to "[make] clear [that] even elements that include mixed questions of fact and law must be submitted to and decided by the jury." *Vasquez*, 267 F.3d at 89 (citing *Gaudin*, 515 U.S. at 512-13). *Gaudin* dealt with the element of materiality of false statements, but was subsequently applied to other elements such as the question of whether commerce was interstate. *See id.* (finding that after *Gaudin*, the question of whether commerce was interstate must be decided by the jury).

At trial, Petitioner's attorney claimed that counts two and four, which involved interstate commerce elements, were jurisdictionally defective because the money that was being carried by Anchor did not technically belong to Caldwell or Dubovsky-the only entities that were alleged to have engaged in interstate commerce-since they were reimbursed or indemnified by Anchor. (Tr. 975.) Counsel then made a related challenge to the jury instruction on the subject of interstate commerce, arguing that the jury could find that at the time that the money was stolen, it no longer belonged to Caldwell or Dubovsky, and that therefore there was no interference with

interstate commerce. (*Id.* at 979-81.) Trial counsel then stated, however, that "I don't have a problem if you want to say . . . that Dubovsky and Caldwell are an entity [sic] in interstate commerce." (*Id.* at 981.) He subsequently explained that he was arguing that "if the jury finds that this was not the property of Dubovsky and Caldwell, then . . . the government failed to prove that Anchor Armored was involved in interstate commerce." (*Id.* at 982.) Defense counsel characterized the different portions of the jury instruction as "inconsistent." (*Id.* at 980.)

It appears from this record that defense counsel was not necessarily challenging the Court's right to make a finding as a matter of law that the relevant commerce was interstate, but rather, was pointing out that there were two separate issues to be resolved: first, whether or not Dubovsky and Caldwell were entities engaged in interstate commerce, and second, whether the money that was stolen actually belonged to Dubovsky or Caldwell. Counsel apparently agreed that the Court had the right to decide the first issue as a matter of law. (*Id.* at 981.) Because the record is somewhat ambiguous, however, the Court will assume, *arguendo*, that counsel's objections were sufficient to preserve the claim that the jury must decide whether the commerce was interstate.

This claim was not, however, preserved on appeal. (*See* Pet.'s App. Br., 1995 WL 17202812.) Petitioner must therefore demonstrate "cause" and "prejudice" for the failure to raise the claims earlier. *Bousley v. United States*, 523 U.S. 614, 622-23 (1998). The only explanation Petitioner has offered for his failure to assert the claim on appeal is the allegation that his appellate counsel was ineffective in failing to raise this issue. Since claims of ineffective assistance of counsel can be considered

at this stage, *Massaro v. United States*, 538 U.S. 500, 504 (2003), the Court will consider whether counsel's failure to raise this claim constituted ineffective assistance.

In *Strickland v. Washington*, the Supreme Court established a two-part test to determine whether an attorney's performance was ineffective. First, a defendant or petitioner "must show that counsel's representation fell below an objective standard of reasonableness. . . . under prevailing professional norms." 466 U.S. 668, 688 (1984). Second, the defendant or petitioner must show that counsel's performance prejudiced his defense. *Id.* at 689. To show prejudice, there must be a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Id.* at 694.

The Court is unable to conclude that appellate counsel's performance was ineffective. "Appellate counsel need not raise every colorable claim in order to provide effective assistance of counsel," *Simon v. Miller*, 2002 WL 48805, *3 (S.D.N.Y. Jan. 14, 2002) (citing *Jones v. Barnes*, 463 U.S. 745, 754 (1983)), though "appellate counsel is considered ineffective when she omits 'significant and obvious issues.'" *Id.* (quoting *Mayo v. Henderson*, 13 F.3d 528, 532 (2d Cir.1994)). The Court finds that the import of *Gaudin* was not so clear or obvious such a short time after the decision was rendered[3] that appellate counsel can be said to have provided unreasonably deficient representation in failing to raise the *Gaudin* issue.

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3. *Gaudin* was decided on June 19, 1995 and Petitioner's appellate counsel filed his appellate brief on July 3, 1995.

First, though much of the language of *Gaudin* was general in tone, on its face *Gaudin* applied to a different element than that at issue here, *i.e.* materiality of alleged false statements rather than whether commerce is interstate or intrastate. The Supreme Court's analysis in *Gaudin* emphasized the fact that there was a substantial history and tradition of juries considering the question of materiality. 515 U.S. at 515-19 (reviewing the extent to which juries had historically decided the element of materiality, and noting that "it is precisely historical practice that we have relied on in concluding that the jury must find all the elements"). However, history and tradition were different with respect to the element of interstate commerce, which was almost never submitted to a jury. *See United States v. Parker*, 73 F .3d 48, 52 (5th Cir.1996) (noting that "[i]n contrast [to the element of materiality considered in *Gaudin*], the effect on interstate commerce, although an element of the crime, is purely jurisdictional in nature, with no historical role whatsoever for the jury in determining the issue"). Therefore, although *Gaudin* was ultimately extended to the element of interstate commerce, it was not necessarily obvious that this extension would occur.

Second, it was not immediately apparent which instructions typically used by courts in jury instructions would pass muster and which would not. Uncertainties as to the precise implications of *Gaudin* were expressed by courts for a number of years, and different circuits disagreed as to its interpretation. *See, e.g., United States v. Shinault*, 147 F.3d 1266, 1277 (10th Cir.1998) (noting that "[t]wo other circuits appear to have held that the *Gaudin* rule is limited to cases in which the element at issue was not submitted [at

all] to the jury," and declining to decide whether "the rule in *Gaudin* extends to a case in which the element *was* submitted but in such a way as to effectively dictate the jury's application of the law to the facts") (citing *United States v. Castleberry*, 116 F.3d 1384, 1389 (11th Cir.1997); *United States v. Parker*, 104 F.3d 72, 73 (5th Cir.1996). As discussed below, it appears even now that the language used by the Court in Petitioner's case may not actually have been in violation of *Gaudin*. For these reasons, the Court cannot find that appellate counsel's performance was unreasonably deficient.

Additionally, with respect to the prejudice prong of *Strickland*, the Court finds that it does not appear probable that the Second Circuit would have granted relief on appeal even if appellate counsel had raised the *Gaudin* issue, given that the Second Circuit denied relief in *Vasquez*, 267 F.3d 79, a very similar case. In *Vasquez*, a *Gaudin* issue was raised because the district court had informed the jury that "either heroin or cocaine trafficking *necessarily involves foreign commerce*, because the raw materials for these substances originate outside the *United States.*" *Vasquez*, 267 F.3d at 88. The Second Circuit found that the charge was not in violation of *Gaudin* because the district court also stated that:

> [b]efore you can find the defendant guilty of each of these counts, *you must find* also that, at the time the alleged murder took place, there existed an enterprise engaged in racketeering activity. . . . This element has three parts: (1) The existence of the enterprise or group; (2) The enterprise's engagement in acts of racketeering; and (3) *The*

enterprise's effect on interstate commerce.

and that:

> *if you find* that an enterprise was involved in a racketeering activity, and *that the enterprise had an effect, be it legal or illegal activity, on interstate and foreign commerce*, then you may find a racketeering enterprises [sic] existed.

Id. at 89. The Second Circuit held that despite the fact that the charges "removed from the jury at least a portion of the jurisdictional element," when considered in their entirety the instructions conveyed to the jury that they were to determine whether the interstate commerce element was satisfied. *Id.*

In the case at bar, the objectionable portion of the jury charges consisted of the following statements made by the Court: "[i]n this case there is no issue as to . . . what is considered interstate commerce"; "it is a question of law for me to decide whether an activity or business is considered interstate commerce"; and "I instruct you that the objects or activity referred to in the indictment are interstate commerce." (Tr. 1146-47.)

However, "[i]n evaluating a challenged jury instruction, [a court] must first 'focus on the specific language challenged, to determine whether it passes muster[;][n]ext, [the court] must review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *Vasquez*, 267 F.3d at 88 (quoting *United States v. Coyne*, 4 F.3d 100, 113 (2d Cir.1993) (internal quotation marks and

citations omitted)). Here, the charges read as a whole conveyed to the jury that they were to decide whether Petitioner's actions had an impact on interstate commerce. Apart from making the statements quoted above, the Court instructed the jury that:

> With respect to the third element — that interstate commerce, or an item moving in interstate commerce, was delayed, obstructed or affected in some way as a result of the defendant's actions — it is a *question of fact for you, the jury, to determine* in accordance with my instructions whether such a delay, obstruction or effect has occurred. . . . *Your main concern* is with the second [use of force or threat of force] and *third [interstate commerce]* elements of the crime of obstructing interstate commerce by robbery. . . . If you decide that the defendant obtained another's property against his will by the use of threat or force, violence or fear of injury, *you must then decide whether this action would affect interstate commerce* in any way or degree. *You must determine whether there is [an] actual or potential effect on commerce within one state that goes to any place outside that state.*
>
> If *you decide that there was any effect at all on interstate commerce*, then that is enough to satisfy this element. The effect can be minimal. For example, if a successful robbery of money would prevent the use of those funds to purchase articles

> which travel through interstate commerce, that would be [a] sufficient effect on interstate commerce.
>
> You do not have to decide whether the effect on interstate commerce was harmful or beneficial to a particular business, or to commerce in general. The government satisfies its burden of proving an effect on interstate commerce if it proves beyond a reasonable doubt any effect, whether it is harmful or not.
>
> The defendant need not have intended or anticipated an effect on interstate commerce. *You may find* the effect is a natural consequence of his actions. If *you find* that the defendant intended to take certain actions — that is, he did the acts charged in the indictment in order to obtain property — and *you find* those actions to have either caused [sic] or would probably cause an effect on interstate commerce, then *you may find* the requirements of this section have been satisfied.

(Tr. at 1147-50.)

As in *Vasquez*, 267 F.3d 79, a seemingly absolute statement, to the effect that the Court had decided the interstate commerce issue as a matter of law, was followed by detailed instructions to the jury informing them that they should decide whether interstate commerce was affected and explaining how they could make this finding (for example,

explaining that the effect could be minimal and that the effect did not have to be intentional). Therefore, this Court finds that, as in *Vasquez*, "[w]hen examined in its entirety, the jury charge stated several times that it was for the jury to find whether the interstate/foreign commerce element had been proven by the government." *Vasquez*, 267 F.3d at 88.

Because Petitioner cannot establish that his appellate counsel was ineffective according to the standards of *Strickland*, he has not demonstrated cause for failure to raise the claim on appeal, and therefore the claim must be denied as procedurally barred. *Bousley*, 523 U.S. at 622-23.

II. Ground Four

Petitioner asserts that appellate counsel was ineffective in failing to make a constructive amendment of the indictment argument under *Stirone*, 361 U.S. 212, and that he should now be granted relief on this basis. The Court already considered Petitioner's *Stirone* argument in its Order denying Petitioner's habeas petition, finding that "[s]ince the indictment did not allege some other specific effect, the government remained free to prove that interstate commerce was affected by depletion of the assets of Caldwell and Dubovsky." *Pipola*, 1999 WL 993718, at *6. The Court distinguished a case such as Petitioner's, in which the possible bases for conviction are narrowed by the evidence presented at trial, rather than broadened, from cases such as *Stirone*, in which an indictment does allege a particular type of effect on interstate commerce and therefore that specific effect must be proven by the government. *Id.* at *6 n. 4 (citing *United States v. Zingaro*, 858 F.2d 94, 99 (2d Cir.1988)).

The Court finds that Petitioner has presented no argument that would be sufficient to meet the standard of Federal Rule of Civil Procedure 60(b) and finds no basis at this point to reconsider its earlier findings. Additionally, as the Court found that there is no merit to Petitioner's *Stirone* claim, appellate counsel cannot be held ineffective for failing to raise the claim. "[F]ailure to assert a baseless claim does not fall below an objective standard of reasonableness nor prejudice the defendant." *Sanchez v. United States*, 2005 WL 1005159, *3 (S.D.N.Y. Apr. 30, 2005).

III. Ground Five

Petitioner argues that the evidence presented at trial was factually and legally insufficient to convict Petitioner on both of the 924(c) counts. The Court can find no antecedent to this argument in Petitioner's original motion under § 2255, and therefore the Court cannot reach the claim in the context of a Rule 60(b) motion for reconsideration. Rule 60(b) is not designed to address "new claims never included in the initial petition"; rather, those claims are properly considered as successive habeas petitions. *Jackson v. Walker*, 1998 WL 813439, *5 (S.D.N.Y. Nov. 23, 1998). Petitioner retains the right to file a successive habeas petition asserting any grounds not addressed by the Court in this Order or its previous Orders.

The Court also notes, however, that the question of whether the evidence presented at trial was factually and legally sufficient to convict Petitioner on each of the 924(c) counts was already considered and decided by the Second Circuit. *Pipola*, 83 F.3d 556 (finding, for example, that "under 18 U.S.C. § 2 and § 924(c), all that is required to prove aiding and abetting is some act directly facilitating or encouraging

the use or carrying of a firearm, as opposed to only having knowledge that a firearm will be used in the robbery. The evidence in the present case was sufficient for such purposes: Pipola designed the plans for *two robberies"*) (emphasis added). A habeas court will not usually readjudicate claims previously raised and rejected on direct appeal. *Reed v. Farley*, 512 U.S. 339, 358 (1994) (Scalia, J., *concurring in part and concurring in the judgment*) ("[C]laims will ordinarily not be entertained under § 2255 that have already been rejected on direct review."); *United States v. Perez*, 129 F.3d 255, 260 (2d Cir.1997) ("A § 2255 motion may not relitigate issues that were raised and considered on direct appeal.").

Petitioner seeks to avoid this procedural bar by suggesting that due to appellate counsel's allegedly ineffective representation on appeal, and this Court's subsequent reliance on the findings of the Second Circuit (which Petitioner contends were improper because of counsel's misrepresentations in oral argument), no court has *properly* considered the question of whether Petitioner encouraged others to carry firearms and/or supplied firearms.

Petitioner claims that "the government was allowed to tell the jury over and over, uncorrected, that Pipola supplied the gun; and, to compound the error, appellate counsel told the Second Circuit panel hearing the oral argument that Pipola supplied the gun." (Pet. Repl. at 3.)[4] However, neither this

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4. Similarly, Petitioner asserts that "Mr. Pipola did *not* supply the gun that was used in the robberies, a theory the government has promoted and which *has been erroneously adopted by the courts"*

(Cont'd)

Court nor the Second Circuit found that Petitioner supplied the gun for the robberies; rather, the finding was that Petitioner *"g[ave] Small* the task of supplying a gun." *Pipola, 83 F.3d at 564* (emphasis added). The Second Circuit upheld his conviction on the basis of the finding that Petitioner encouraged others to carry guns, not based on a finding that Petitioner directly supplied guns. Therefore, even if appellate counsel overstated Petitioner's role in the offense, as Petitioner claims, it appears that the Second Circuit disregarded any claims by appellate counsel that Petitioner supplied guns. The Second Circuit also, of course, presumably reviewed the trial transcripts and was familiar with the evidence presented at trial, which supported the finding that Petitioner encouraged others to carry guns, not that Petitioner directly supplied guns.

Moreover, appellate counsel attempted to convince the Second Circuit that Petitioner had not even encouraged Small to supply the gun, stating:

> Small agreed to provide a gun, but there is simply no testimony in the record indicating that Pipola asked Small to provide a gun or that Pipola suggested Small provide a gun. Small himself may

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(Cont'd)

(Fed.R.Civ.P. 60(b) Mot. at 11) (emphasis added) but does not identify any place in which this Court or the Second Circuit actually adopted the position that Petitioner supplied the gun. This Court, like the Second Circuit, has previously stated that the gun was found to have been supplied by Petitioner's co-conspirator Steven Small. *Pipola*, 1999 WL 993718 at *3.

> have suggested that he supply a gun. In short, the evidence adduced by the government was wholly insufficient to prove beyond a reasonable doubt that Pipola actively and directly encouraged Small or anyone else to supply firearms for use in the robberies.

(Pet.App. Br., 1995 WL 17202812, at 13.) Thus, the Court cannot find that appellate counsel committed any legal error or that the alleged errors prejudiced Petitioner, as required for a finding of ineffectiveness under *Strickland.* The Court therefore finds no basis to revisit the findings of the Second Circuit or its own previous decisions.

CONCLUSION

For the reasons stated herein, Petitioner's motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b) is DENIED. The Clerk of Court is directed to enter a final judgment of dismissal and to close the case.

SO ORDERED.

Dated: May 31, 2005
Brooklyn, NY

s/ SJ
Senior U.S.D.J.